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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1015

MAYFAIR MEAT PACKING CORPORATION AND JOHN CARR,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JACK KRANIS,
Counsel for Petitioners.

A. HARRY WEISSMAN,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I

Summary Statement of the Matter Involved

This is a criminal case commenced by the filing of an Information in the office of the Clerk of the United States District Court, Southern District of New York, on April 22nd, 1946.

The Information contained 21 counts charging the defendant in 19 of the said counts with having sold various

quantities and types of meat in violation of Maximum Price Regulation No. 169 promulgated pursuant to the Emergency Price Control Act of 1942 and amendments thereto.

The 18th count of the said Information charges a violation of Maximum Price Regulation 389, and the 21st count, charges a violation of Maximum Price Regulation No. 169, in that the petitioners failed to keep proper books and records as required by the regulation.

There has been no change of parties.

On July 2nd, 1946, the petitioners herein made a motion for leave to file a complaint in the Emergency Court of Appeals, protesting the validity of Maximum Price Regulation No. 169, and for a stay of proceedings pending such determination pursuant to Section 204 of the Emergency Price Control Act. This motion was denied by the Hon. Alexander Holtzoff, on July 10th, 1946.

On August 2nd, 1946, the petitioners pleaded guilty to all the counts contained in the said Information before the Hon. Alexander Holtzoff, the United States District Judge.

On August 16th, 1946, the petitioners were sentenced, as follows:

Mayfair Meat Packing Corp. fined $5,000.00 to cover all counts, jointly and severally with the defendant, John Carr; John Carr, sentenced on count 1, to eight months at a place of confinement to be designated by the Attorney General of the United States; on count 2, fined $5,000.00 jointly and severally with the defendant Mayfair Meat Packing Corp. to one year, on counts 3 to 21, to run concurrently and suspended probation to two years to begin after service of sentence on count 1.

A motion to vacate such judgment was denied. The petitioners were released on bail by order of the Circuit Court of Appeals, Second Circuit, on motion, in the sum of $1,000.00 pending an appeal, which bond was posted in

the office of the Clerk of the United States District Court, Eastern District of New York.

A supersedeas bond in the sum of $5,000.00 to cover the fine was likewise posted in the Office of the Clerk of the said Court. The petitioners herein appealed from the judgment to the Circuit Court of Appeals, Second Circuit, which affirmed with an opinion.

Questions Presented

1. Was the District Court acting in the proper exercise of its discretion in denying the petitioners leave to file a complaint in the Emergency Court of Appeals.

2. May the petitioners be deprived of their right to appeal by the decision of the District Court.

3. May the question of the validity of a price regulation be raised in a District Court.

4. Did the Circuit Court err in affirming the judgment of the District Court.

Reasons Relied upon for Allowance of Writ

1. The Court in denying the petitioners motion for leave to file a complaint in the Emergency Court of Appeals, ignored completely the provisions of the Emergency Price Control Act which provided that such leave should be granted where the Court finds the motion was made in good faith, and that there was a reasonable and substantial excuse for delay, and decided the motion upon other grounds not available to it by law.

2. In denying the petitioners' motion for leave to file a complaint in the Emergency Court of Appeals, the court acted in abuse of its discretion, so that the petitioners were denied the proper exercise of their legal rights and were deprived of those rights without due process.

3. Despite the provisions of the Emergency Price Control Act constituting the Emergency Court of Appeals as the Court of sole jurisdiction to determine the validity of a price regulation, the District Court by its decision undertook to adjudicate the validity of the regulation in question, and passed upon the merits of the proposed complaint concluding that it was "without merit."

4. That the Circuit Court of Appeals by affirming the said decision of the District Court committed the same error by holding that the District Court was properly exercising its discretion when it inquired into the merits of the complaint presented to it and decided that in view of all existing prior adjudications the complaint was "without merit."

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, forthwith to certify and send to this Court a full and complete transcript of the records and proceedings of said Court had in the case numbered and entitled "108—October Term, 1946, United States of America, Appellee vs. Mayfair Meat Packing Corp. and John Carr, Defendants-Appellants, Docket No. 20379", to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, that the judgment herein of the said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem just and proper.

Dated: February 7th, 1947.

JACK KRANIS,
Counsel for Petitioners.

A. HARRY WEISSMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1015

MAYFAIR MEAT PACKING CORP. AND JOHN CARR,
Petitioners,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION

I

Opinion Below

The opinion is reproduced at length in Appendix "A" hereto annexed.

II

Jurisdiction

1. The date of the judgment to be reviewed is August 16th, 1946.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347 (a)).

III

Statement of Facts and Questions Presented

The facts and questions involved have already been stated in the preceding petition, which statement is hereby adopted and made a part of this brief.

Point I

It Was an Abuse of Discretion for the District Court to Deny the Appellants Application for Leave to File a Complaint in the Emergency Court of Appeals.

The application of the petitioners for leave to file a complaint in the Emergency Court of Appeals was seasonably made as appears from the Transcript of Record (page 4, Folio 10).

The Emergency Price Control Act provided that such a motion could be made within thirty days after arraignment in a criminal case. As the act was originally written, the motion could only be made within sixty days after the promulgation of a price regulation. A later amendment provided that the motion could be made "at any time" after such promulgation. However the relief accorded by the Act was deemed to be inadequate and consequently Section 204 (3) (1 & 2) was inserted by the Stabilization Act of 1944, extending the right of a party aggrieved by a price regulation to file a complaint in the Emergency Court of Appeals.

Obviously it was the intention of Congress that these provisions should not be applied in any limited sense. The fair intendment that may be gathered from these successive enlargements of the Act was that leave to apply to the Emergency Court of Appeals should be readily granted as long as there was a finding of good faith in the making of

the application. As a matter of fact, the Congress went further, they provided that such an application could even be made within five days after conviction (Sec. 404(e) (1)).

Certainly this should underscore the liberality with which this section should have been construed. The only other conditions imposed by the Act upon one making an application such as is being considered here, aside from the timeliness of such application, was that the application be made in good faith and with a reasonable and substantial excuse if any delay be shown.

The District Court in making its decision denying the motion, deliberately and expressly refused to consider these two conditions, and decided the motion on other grounds. The grounds for the decision were that the regulation involved had already been adjudicated. This conclusion aside from being gratuitous was incorrect, and will be considered in a later point.

The thing with which we are most concerned at the moment is the fact that the District Court abused its discretion in thus deliberately ignoring the provisions of the statute. Fortunately this contention can easily be borne out since the remarks of the Court are spread upon the record, and the District Judge did not hesitate in stating in clear language his reason for denying the motion.

Upon the argument of the motion the Court remarked (Transcript of Record Page 44, Folio 13):

> "But in addition to good faith you must show some excuse, some reasonable excuse for not having protested against the validity of the regulation to the Administrator."

Therefore it appears that the Court was fully cognizant of the conditions imposed upon it in considering the motion. However, having considered the situation correctly, the

Court after hearing most of the arguments, decided to ignore the conditions imposed upon it, and instead of making a finding that there was a lack of good faith, or a failure to interpose a reasonable excuse for any existing delay, decided to base its opinion solely upon the fact that the regulation had already been adjudicated. It said:

> "If the Emergency Court of Appeals had adjudicated the validity of this regulation and had declared it to be valid, I should be inclined to deny the motion, but a different situation is presented, that no case has been decided by the Emergency Court of Appeals affecting the validity of the regulation" (Page 51, Folio 153 and Page 52, Folio 154).

Further at Page 57, Folio 171, the court said:

> "I am going to grant this motion with leave to the Government to vacate the stay if at any time during the pendency of the proceedings in the Emergency Court of Appeals an adjudication should be handed down by that court sustaining the validity of this regulation in some other case."

The Court decided to go even further (page 58, folio 173):

> "Unless I hear that this regulation has already been upheld by the Emergency Court of Appeals I shall grant the motion with leave to the United States to move to vacate the stay if the validity of the regulation should be upheld in some other proceeding during the pendency of this proceeding."

Of course it is not important to the decision, but the writer believes that the Court did not have the power to grant the petitioners' motion with leave to the Government to vacate the stay, in the event that there was an adjudication at some future time after the motion was granted. The outcome of the argument had before the Court on that day

was summarized at page 59, Folio 176, where the court said:

> "My ruling will be that I shall grant the motion with leave to the United States to vacate the stay if the validity of this regulation 169 should be upheld in any other case during the pendency of the proceeding. Of course if you can show me in the meantime that it has been upheld in another case I will deny the motion, but otherwise I will grant it with the condition that I attach to it."

Mr. Regan: I will try to do that by four o'clock, your honor.

Mr. Fierson: Will we have your Honor's decision tomorrow then?

The Court: Yes.

Mr. Regan: Your Honor, this case is ready for trial. Will you adjourn it to tomorrow?

Having adjourned the motion for the purpose of permitting the Government to research the subject, the Court convened the next day and stated:

> "I indicated that I would grant you leave to appeal to the Emergency Court of Appeals with leave to the Government to move to vacate the stay if in the meantime the Emergency Court of Appeals should adjudicate the maximum price regulation to be valid. Counsel for the Government was apparently not aware at that time as to what the status of the matter was in the Emergency Court of Appeals. This morning he has submitted a memorandum to me indicating that the Emergency Court of Appeals has already held this regulation valid."

Whereupon after some slight discussion the petitioners' motion was denied. Therefore no choice was left to the petitioners but to plead guilty to the Information.

As if to leave no possible room for doubt as to the basis upon which the motion was denied, the District Judge, in response to a request by the United States Attorney wrote a letter, which letter appears on page 41 of the Transcript of Record, wherein he stated at folio 122:

> "While the question as to whether there was a reasonable and substantial excuse for the failure of the defendants to present their objections through administrative channels was discussed, this point did not form any part of the basis for my final conclusion."

The last sentence is the important one, where the Court said that the lack of good faith was the lack of a reasonable and substantial excuse for failure to protest through the proper channels, did not form any part of the basis of his decision.

In other words, no consideration of any act of commission or omission on the part of the appellants which might have determined their good faith was considered or formed any part of the Court's decision, and it is the petitioners' contention that the Court, having the issue of good faith before it, abused its discretion in deciding the motion upon the grounds not authorized.

There is no question but that the applicants were entitled to file a complaint in the Emergency Court of Appeals, since a substantial right was involved, this being a criminal proceeding, and the petitioners subject to heavy penalties.

Thomas Paper Stock Co. v. *Bowles*, 65 S. Ct. 4109, 89 L. Ed. —.

Point II

The Courts Below Erred in That the Grounds upon Which the Motion Was Decided Were Unauthorized and Usurped the Powers of the Emergency Court of Appeals.

As has been previously stated, the Court made it very clear that the basis for the decision was the prior adjudication of the regulation.

In the first place, such a decision was an error of the Court for the reason that the whole proceeding was governed by the Emergency Price Control Act. The Act expressly lays down the two conditions necessary for the granting of the motion. The Court, knowing of these conditions, nevertheless, refused to be bound by them, and decided the motion on the ground that the regulation had been adjudicated.

Secondly, it is the petitioners' contention that when the Court decided that the regulation had been adjudicated, it usurped the powers of the Emergency Court of Appeals.

The Emergency Price Control Act provided, that the Emergency Court of Appeals shall have sole jurisdiction over the validity of price regulations. In order for the District Court to arrive at a decision that the regulation had been decided, it must have gone through a certain judicial process, and it must necessarily have gone into the facts in each case, and applied them to the situation presented in the petitioners' motion papers. Otherwise how could it say that the regulation had been declared valid, and consequently that the petitioners' application lacked merit.

Certainly it cannot logically be argued that since there is a statute, and since there are decisions purporting to support the statute, *ergo*, the statute is in every respect valid.

The price regulation involved here had many aspects as will appear from the point following, and the few decisions cited by the Government certainly did not determine all of them. The situation presented in the motion papers was not presented in any of the cases cited. So when the Court below says that the application is without merit because of certain prior adjudications, it is actually determining the validity of a price regulation insofar as it applies to the petitioners, and this it may not do since only the Emergency Court of Appeals had such jurisdiction.

Point III

The Court Below Erred in Its Conclusions That Revised Maximum Price Regulation No. 169 Had Been Adjudicated.

Even assuming that somehow the Court below had the right to go into the merits of the application, and to consider the decisions reported under the price regulation, it is nevertheless the contention of the petitioners that none of these cases cited had any application to the facts as set forth in the Appellants' motion papers (Transcript of Record, page 27 *et seq.*).

The Government cited four cases, and they will be considered individually.

The first case: *Armour* v. *Bowles,* 148 Fed. 2nd 529, 325 U. S. 871 Cert. Den., which was a very learned dissertation on conditions pertaining in the meat industry, concerned itself entirely with that portion of 50 U. S. C. A. Appendix Section 902-A, which provided:

> "That no such regulation or order shall contain any provision requiring the determination of cases otherwise than in accordance with the established accounting method."

The petitioners' application to the Court was not mainly concerned with the accounting methods pertaining in the industry. Other and more important points were raised in the proposed complaint.

The second case: *Oswald & Hess Co.* v. *Bowles,* 148 Fed. 2nd 543, 325 U. S. 871, concerned itself with a protest brought on the grounds that the Maximum Price Regulation was discriminatory, in that it permitted certain established mark-ups to hotel supply houses, and to purveyors of fabricated cuts of beef.

The petitioners are certainly not concerned with any such situation, and the decision of this case has absolutely nothing to do with the situation at hand, nevertheless it was one of the cases cited upon which the District Court determined that there was a prior adjudication of the regulation.

Horns v. *Bowles,* 151 Fed. 2nd 191, was simply another case which considered the system of cost accounting currently in use in the Industry. The only case of the four, which might have been considered in application to the petitioners, was the case of *Heinz* v. *Bowles,* 151 Fed. 2nd 532, 324 U. S. 871. Even in this case the Court originally found the regulation invalid (149 Fed. 2nd 277), and thereafter upon a stipulated state of facts reversed itself and decided that the regulation was valid after all. However, even that case did not entirely cover the situation presented by the petitioners in their motion papers. It was the petitioners' contention that Maximum Price Regulation 574, which had not yet been promulgated at the time of these decisions, was invalid. Since this later regulation purported to control the purchase and sale of live stock, and since it was the petitioners' contention that this regulation was invalid, that consequently the regulation controlled the sale of beef at wholesale, Revised Maximum Price Regula-

tion No. 169, was also invalid. In other words it may be said: Since there is no control of live stock there can be no valid control of the wholesale sale of beef.

Although there are cases pending before the Emergency Court of Appeals (*Federated Meat Corp.* v. *Porter,* No. 330) no decision has as yet been forthcoming as to the validity of the live stock regulation, so that the petitioners should be allowed to present the situation to the Emergency Court of Appeals for an adjudication, and it was an abuse of discretion for the Court to decide that their petition was without merit on the basis of this so-called prior adjudication.

Point IV

The Validity of the Regulation May Be Raised in the District Court and in the Circuit Court

Assuming that the Court below may exercise its discretion so as to deny the appellants' application, the appellants should still have the right to raise the question of the validity of the regulation in the District Court. The case of *Yakus* v. *United States,* 321 U. S. 441, which decided that the Emergency Court of Appeals had exclusive jurisdiction to decide the validity of price regulations also stated in its opinion, as follows:

> "We have no occasions to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional in its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. There is no contention that the regulation is void on its face, petitioners have taken

> no steps to challenge its validity by the procedure that was open to them and it does not appear that they have been deprived of the opportunity to do so."

Here were such defendants, forced to trial while diligently seeking determination of the validity of the regulations involved. They were deprived of their defense and of their right to challenge the validity of the regulation. No course is left open to them but to raise such a defense in the District Court, and, on appeal, in this Court. It is the appellants' contention that the Supreme Court in the *Yakus* case, in paragraph cited above, indicated that under some circumstances, the validity of a regulation may be raised in the District Court.

Point V

The Circuit Court of Appeals Erred in Sustaining the Judgment of the District Court

The Circuit Court, in its opinion Appendix A stated:

> "What has troubled us is whether such information as the record discloses concerning the basis of the decision below is enough to show that the trial judge found that the appellants did not make the motion in good faith. That was the decisive thing for he had no jurisdiction to decide whether or not the regulation was valid and deny the motion simply because he was of that opinion. Yakus *v.* United States, 321 U. S. 414."

In other words, the Circuit Court of Appeals was now attempting to salvage the judgment of the Court below in attempting to spell out a lack of good faith from the record below, despite the fact that the District Judge had specifically stated that he was not concerned with the issue of good faith. Whereupon the Circuit Court made a finding that there was a lack of good faith, a finding which was not

within its powers or its jurisdiction. This appears in the opinion, where it is stated:

> "Consequently, the motion lacked the element of good faith required by the statute. While that does have to be spelled out of the record as a whole, we think it does appear clearly enough to preclude us from holding that the denial of the motion has been shown erroneous."

Conclusion

For the reasons set forth, it is respectfully submitted that the Circuit Court of Appeals for the Second Circuit erred in its decision sustaining the judgment of the District Court, and that the District Court erred in its refusal to grant the motion for leave to file a complaint in the Emergency Court of Appeals, and for a stay pending the determination of said motion.

Respectfully submitted,

JACK KRANIS,
Attorney for Petitioners.

A. HARRY WEISSMAN,
Of Counsel.

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Dowling Brothers Distilling Co. v. *United States*, 153 F. 2d 353, certiorari denied *sub nom. Gould* v. *United States*, 328 U. S. 848 — 6

Federated Meat Corp. v. *Fleming*, E. C. A., February 12, 1947 (not yet reported) — 8

Heinz v. *Bowles*, 149 F. 2d 277, upon reconsideration 150 F. 2d 546, certiorari denied *sub nom. E. Kahn's Sons Co.* v. *Bowles*, 326 U. S. 719 — 7, 8

Horne v. *Bowles*, 151 F. 2d 191 — 8

Oswald & Hess Co. v. *Bowles*, 148 F. 2d 543, certiorari denied, 325 U. S. 871 — 7

Ben H. Rosenthal & Co. Inc. v. *Porter*, 158 F. 2d 171 — 8

United States v. *Aronin*, 57 F. Supp. 186 — 6

United States v. *George F. Fish, Inc.*, 154 F. 2d 798, certiorari denied, 328 U. S. 869 — 9

United States v. *Tantleff et al.*, 155 F. 2d 27, certiorari denied *sub nom. Lieberman* v. *United States*, 328 U. S. 869 — 9

Yakus v. *United States*, 321 U. S. 414 — 8, 9

Statutes:

Emergency Price Control Act, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 et seq.):

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Regulations:

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1015

MAYFAIR MEAT PACKING CORPORATION AND JOHN CARR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not render an opinion. Its judgment appears at pages 76 and 77 of the record. The opinion of the Circuit Court of Appeals (R. 95–98) is reported at 158 F. 2d 685.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 11, 1947 (R. 99). An order extending until February 14, 1947, the time within which to file a petition for certiorari was

entered on February 10, 1947 (R. 100). The petition for the writ of certiorari was filed on February 11, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals was correct in holding that the record showed that the basis of the trial judge's denial of the motion for leave to file a complaint in the Emergency Court of Appeals under Section 204 (e) of the Emergency Price Control Act was petitioners' failure to meet the "good faith" requirements of that section.

2. Whether it is an abuse of discretion for a trial judge to hold that objections to a price regulation set out in a motion for leave to file a complaint in the Emergency Court of Appeals under Section 204 (e) were not made in "good faith," where the objections apparently had been rejected by prior decisions of the Emergency Court of Appeals.

3. Whether the district court had jurisdiction to determine the validity of a price regulation in a criminal proceeding for violations during 1945 of the Emergency Price Control Act, against a defendant who took no steps to protest the regulation prior to the filing of the information.

STATUTE AND REGULATIONS INVOLVED

Section 204 (e) of the Emergency Price Control Act, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 et seq.) is set forth in the Appendix.

STATEMENT

Petitioners are a corporation and its president, engaged in the wholesale-meat business. On April 22, 1946, an information containing twenty-one counts, nineteen founded on sales of meat in violation of Revised Maximum Price Regulation No. 169, as amended (7 F. R. 10381; 10 F. R. 6182), one alleging failure to keep proper records under that regulation and one for violation of Maximum Price Regulation 389 (8 F. R. 5903) was filed. (R. 7–21.) On June 3, 1946, petitioners made a motion for leave to file a complaint in the Emergency Court of Appeals under Section 204 (e) of the Emergency Price Control Act, setting forth objections to the validity of Revised Maximum Price Regulation 169. The chief ground alleged in support of the claim of invalidity was the lack of control of live-cattle prices and the ineffectiveness of Maximum Price Regulation 574, as amended (10 F. R. 1270, 3691, 4099) which established buyers' ceiling price for livestock, to effect adequate control of the live-cattle market. (R. 27–33.) The affidavits accompanying the motion set forth the pendency of numerous other protests as petitioners' reasonable excuse for failure to protest earlier (R. 25–26).

This motion was denied by District Judge Holtzoff, sitting in the Southern District of New York, without opinion (R. 63). Judge Holtzoff subsequently upon request, stated in a letter to the United States Attorney that he denied the motion because the validity of the regulation had already been upheld by the Emergency Court of Appeals in previous cases; he specifically disclaimed any decision on whether petitioners made out the required "reasonable and substantial excuse" for their previous inaction (R. 41).

Petitioners pleaded guilty and were sentenced. They were fined five thousand dollars jointly and severally on Count 2. On Count 1, John Carr was sentenced to eight months imprisonment and was also given concurrent suspended sentences of a year on each of the remaining counts. (R. 76, 77.)

Petitioners moved in arrest of judgment on the ground that Revised Maximum Price Regulation 169 was invalid for the reasons set out in the original motion (R. 80–82). This motion was denied (R. 90).

On appeal from the judgment, petitioners urged that it was an abuse of discretion to deny their motion for leave to file a complaint on the ground stated, particularly since the prior decisions of the Emergency Court of Appeals allegedly did not foreclose their success in that court. They also urged that the District Court had jurisdiction to consider the validity of the regulation. The Cir-

cuit Court of Appeals for the Second Circuit affirmed, holding that the whole record showed that the trial judge had found that petitioners were lacking the required "good faith," in that they could not really believe that their complaint would be successful. It also noted that there was no jurisdiction to consider validity of the regulation in the District Court. (R. 95–98.)

ARGUMENT

1. Section 204 (e) (1) of the Emergency Price Control Act provides that the defendant in any criminal proceeding under the Act may apply for leave to file a complaint in the Emergency Court of Appeals setting forth objections to the validity of any provisions which the defendant is alleged to have violated. Leave is to be granted with respect to any objection which the court finds is made in good faith and with reasonable excuse for failure to file a protest. The trial judge did not make any decision with respect to the "reasonable excuse" requirement but stated in a letter which was the equivalent of an opinion that he found the application "lacking in merit" (R. 41). Other portions of the record show, as the Circuit Court of Appeals found, that this statement and the denial of the motion were not intended as a direct ruling on the validity of the regulation, but as a holding that it was inconsistent with petitioners' "good faith" to present objections of an insubstantial nature, which were bound to be

overruled. The trial judge in subsequent proceedings demonstrated that he knew he could not determine the validity of the regulation by remarking that "If the Court had jurisdiction," it would hold the regulation valid (R. 90). Earlier, he had declared that if the objections raised by petitioners had already been decided, he would regard their motion as "dilatory and possibly frivolous" (R. 52). See also R. 51–52, 57, 58, 59. In the context of these comments, the purpose of his consideration of the decisions of the Emergency Court of Appeals is clarified and shown to be part of his determination of the "good faith" issue.

2. The bearing of the substantiality of the objections to the price regulation upon the issue of good faith is evident. Leave to file a complaint under Section 204 (e) was intended as an unusual privilege for truly deserving cases, not as a matter of right. *Dowling Bros. Distilling Co.* v. *United States,* 153 F. 2d 353 (C. C. A. 6), certiorari denied *sub. nom. Gould* v. *United States,* 328 U. S. 848; *United States* v. *Aronin,* 57 F. Supp. 186 (S. D. N. Y.); statement by Senator Wagner, presenting the Conference Report (H. Rep. No. 1698, 78th Cong., 2d Sess.) to the Senate, 90 Cong. Rec. 6368. Relief was to be limited to those who might have successfully challenged a regulation but for excusable failure to protest (S. Rep. No. 922, 78th Cong., 2d Sess., p. 13); it was reiterated in the debates that repeated at-

tacks on the validity of a regulation of a kind already decided should not be countenanced under this section (House debates, 90 Cong. Rec. 5869, 5870, 5871). Certainly, then, it was no abuse of discretion to hold that it was with a dilatory intent and, therefore, not in good faith, to present insubstantial challenges to the regulation.

The trial court was completely justified in holding that the petitioners' objections were insubstantial in the light of the prior decisions of the Emergency Court of Appeals. Petitioners were non-processing slaughterers and wholesalers (R. 81). Their motion presented general objections to Revised Maximum Price Regulation 169 based on the lack of control of the livestock market, and the ineffectiveness of Maximum Price Regulation 574 insofar as it established such control. Petitioners admittedly claimed invalidity on the same grounds as were urged in numerous other protests, and did not rely on any particular facts in relation to their own business (R. 24, 44, 46). The objections outlined in their proposed complaint were considered and rejected in *Heinz* v. *Bowles,* 149 F. 2d 277, upon reconsideration, 150 F. 2d 546, certiorari denied *sub nom. E. Kahn's Sons Company* v. *Bowles,* 326 U. S. 719, which held that the regulation, taken together with the livestock subsidy program, was currently valid as to non-processing slaughterers. See also, *Armour & Co.* v. *Bowles,* 148 F. 2d 529 (E. C. A.), certiorari denied, 325 U. S. 871; *Oswald & Hess Co.*

v. *Bowles,* 148 F. 2d 543 (E. C. A.), certiorari denied, 325 U. S. 871; *Horns* v. *Bowles,* 151 F. 2d 191 (E. C. A.); *Ben H. Rosenthal & Co., Inc.* v. *Porter,* 158 F. 2d 171 (E. C. A.), for decisions on the general validity of Revised Maximum Price Regulation 169. The *Heinz* decision was announced on July 31, 1945, and its determination of current validity covered the very period of petitioners' violations, June through August 1945.

Petitioners' objections to Maximum Price Regulation 574 do not raise issues outside the scope of the *Heinz* decision, for the opinion in that case upheld Revised Maximum Price Regulation 169 on the basis of the actual profits of the non-processing slaughterers during 1944, when there was no price control over the livestock market other than the cattle stabilization plan of subsidy payments, as well as the early months of 1945, when Maximum Price Regulation 574 was in effect. The direct control over livestock prices in the latter Regulation reinforced rather than weakened the reasoning of the *Heinz* decision, and it has been so held recently in *Federated Meat Corp.* v. *Fleming,* E. C. A. February 12, 1947, not yet reported. In view of this decision, petitioners' proposed complaint could now serve only a dilatory purpose.

3. The question left open by this Court in *Yakus* v. *United States,* 321 U. S. 414, as to the possible right of a diligent defendant to assert the invalidity of the controlling price regulation in a

criminal proceeding is not, on the facts, involved in this case. Petitioners failed to take any action to procure a determination of the validity of the regulation until they were subjected to criminal prosecution. They cannot with success claim to have been "forced to trial * * * while diligently seeking determination of * * * validity by the statutory procedure" (*Yakus* v. *United States, supra,* at 447). However, even should petitioners be thought to be within the *caveat* of the *Yakus* opinion, the district court would have no jurisdiction to determine the validity of the regulation. The liberalized provisions for stays were added to the Act by the Stabilization Extension Act of 1944, 58 Stat. 639, for the express purpose[1] of destroying any basis for the possible exception to the exclusive jurisdiction doctrine. The amendment of 1944 has been recognized as eliminating the due process issue undecided in the *Yakus* case. *United States* v. *George F. Fish, Inc.,* 154 F. 2d 798 (C. C. A. 2), certiorari denied, 328 U. S. 869; *United States* v. *Tantleff, et al,* 155 F. 2d 27 (C. C. A. 2) certiorari denied *sub nom. Lieberman* v. *United States,* 328 U. S. 869.

[1] See the remarks of Senator Danaher, quoting the sentence reserving this issue in the *Yakus* case, and then adding (90 Cong. Rec. 5305): "But in what we have done we have perfected the two points as to which the Supreme Court had entered no decision, to the end that there can be no question of the denial of or the existence of due process. Thus we afford a remedy which is a complete answer in both those respects, because we give the citizen time within which he can file the protest."

CONCLUSION

The decision of the court below was correct. There are no conflicts of decision, and no question of general importance is involved. The petition should be denied.

Respectfully submitted.

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MARCH 1947.

APPENDIX

Section 204 (e) of the Emergency Price Control Act as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 et seq.):

> SEC. 204 (e) (1).[1] Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code,[2] involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate.[3] The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a com-

[1] Entire Subsection (e) added on June 30, 1944, by 58 Stat. 632.

[2] Last ten words added on June 30, 1945, by 59 Stat. 306.

[3] Last four words added on June 30, 1945, by 59 Stat. 306.

plaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code,[2] involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code,[2] setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to

[2] Last ten words added on June 30, 1945, by 59 Stat. 306.

such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code;[2] nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

[2] Last ten words added on June 30, 1945, by 59 Stat. 306.

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